

ONE HUNDRED SIXTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115  
Majority (202) 225-2927  
Minority (202) 225-3641  
February 19, 2019

92

The Honorable Ajit V. Pai  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Chairman Pai:

Pursuant to Rules X and XI of the U.S. House of Representatives, I write to request all documents related to your decision to deny the Committee's request for an emergency briefing regarding wireless carriers' unauthorized disclosure of consumers' real-time location data, including all legal guidance related to whether work on the issue was exempt activity during the shutdown.<sup>1</sup>

On January 11, 2019, I wrote to the Federal Communications Commission (FCC) to request that you or your designate hold an emergency briefing for the Committee on the FCC's progress toward ending wireless carriers' unauthorized sharing of customer location data.<sup>2</sup> You refused the request despite continuing to work at the agency during the shutdown. Your staff stated that one of the reasons for denying the request is that FCC staff were not permitted to work on the matter because it did not qualify as exempt under the agency's interpretation of the law. It is important that the Committee understand your basis for denying the request given the grave consequences that unauthorized sharing of customer location data could have for public safety and national security, and that is why I am making this request.

---

<sup>1</sup> Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, to Ajit Pai, Chairman, Federal Communications Commission (Jan. 11, 2019).

<sup>2</sup> See note 1.

The Honorable Ajit V. Pai  
February 19, 2019  
Page 2

Please provide the requested documents by March 12, 2019. An attachment to this letter provides additional specific instructions and definitions for responding to the Committee's requests. Thank you for your attention to this important matter. If you have any questions, please contact Gerald Leverich of the Committee staff at (202) 225-2927.

Sincerely,

A handwritten signature in blue ink, appearing to read "Frank Pallone, Jr.", with a stylized flourish at the end.

Frank Pallone, Jr.  
Chairman

**Responding to Document Requests from the  
Committee on Energy and Commerce**

In responding to the document request from the Committee on Energy and Commerce, please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents in your possession, custody, or control.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual denoted in the request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.
4. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
5. Documents produced in electronic format should also be organized, identified, and indexed electronically. Documents produced in an electronic format should also be produced in a searchable format.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. When you produce documents, you should identify the paragraph or clause in the Committee's request to which the documents respond.
8. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.

9. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph or clause of the request to which the documents are responsive, should be provided in an accompanying index.
10. It is not a proper basis to refuse to produce a document that any other person or entity also possesses a nonidentical or identical copy of the same document.
11. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (8) and (9) above.
12. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2017 to the present.
16. This request is continuing in nature and applies to any newly discovered document. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
17. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
18. All documents should be bates-stamped sequentially and produced sequentially.

19. Two sets of documents should be delivered, one set to the majority staff and one set to the minority staff. The majority set should be delivered to the majority staff in Room 2218 of the Rayburn House Office Building. You should consult with Committee staff regarding the method of delivery prior to sending any materials.
20. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee or identified in a privilege log provided to the Committee.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto). The term also means any graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "documents in your possession, custody, or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that you have placed in the temporary possession, custody, or control of any third party.
3. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, email (desktop or mobile device), text message, instant message, MMS or SMS message, or otherwise.
4. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of the request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.



5. The terms "person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.
6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
7. The terms "referring" or "relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.
8. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.
9. The term "FCC Licensee" means a company licensed by the FCC, including but not limited to those licensed to provide wireline or wireless telecommunications, broadband internet access, cable, satellite, or any other FCC licensed service and includes the subdivisions, subsidiaries, entities, affiliates, officials, officers, administrators, employees, attorneys, advisors, consultants, staff, or any other persons acting on behalf of or under the control or direction of such licensee
10. The term "Federal Communications Commission" includes all of the FCC's offices, subdivisions, entities, officials, officers, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on behalf of or under the control or direction of the Federal Communications Commission.



Federal Communications Commission  
Washington, D.C. 20554

March 12, 2019

The Honorable Frank J. Pallone, Jr.  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Pallone:

I write in response to your February 19, 2019 letter to Chairman Pai concerning the Federal Communications Commission's investigation into the alleged unauthorized disclosure by wireless carriers of consumers' real-time location data.<sup>1</sup>

The Commission takes allegations of unauthorized use and disclosure of consumer data very seriously. For that reason, last year the Enforcement Bureau initiated an investigation into reports that wireless carriers were allowing third parties to use consumers' location information without their consent. In the meantime, several wireless carriers voluntarily committed to stop selling phone location data to third parties. The Commission's investigation remained pending on January 3, 2019, when the Commission became unable to continue normal operations due to a lapse in appropriations.

The Commission relies on Congressional appropriations to carry out its important consumer-protection work—including investigating potential violations of Commission rules. During the shutdown, the Commission operated in accordance with its Office of Management and Budget (OMB)-approved Plan for Orderly Shutdown.<sup>2</sup> Under that plan, which implements the terms of the Antideficiency Act (ADA), the Commission ceased all activities "other than those immediately necessary for the protection of life or property, performing other excepted activities or those funded through a source other than lapsed appropriations."<sup>3</sup> Among other things, the plan (containing language that also appeared in the Obama Administration's plan) provides that "consumer protection . . . enforcement must cease."<sup>4</sup> Accordingly, Commission staff did not work on the location data investigation during the partial government shutdown.

On Friday, January 11, during the shutdown, you requested an "emergency briefing" from the Chairman or his designate in three days' time on the actions the Commission has taken

---

<sup>1</sup> See Letter from Rep. Frank Pallone, Jr., Chairman House Committee on Energy and Commerce, to Ajit Pai, Chairman, Federal Communications Commission (Feb. 19, 2019).

<sup>2</sup> See FCC Plan for Orderly Shutdown Due to Lapse of Congressional Appropriations, January 2019, *available at* <https://docs.fcc.gov/public/attachments/DOC-355868A1.pdf>.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*; see also FCC Plan for Orderly Shutdown Due to Lapse of Congressional Appropriations, September 27, 2013 at 2.



with respect to the allegations of unauthorized disclosure of location data.<sup>5</sup> Specifically, you noted that on January 8, an article was published claiming that, despite their earlier commitments, several carriers were continuing to sell access to their customers' location data. On receipt of your letter, Chairman Pai requested guidance from the Office of General Counsel on whether Commission staff could brief Committee staff—or provide him with the information he would need to do so—during the government shutdown.

Career attorneys within the Office of General Counsel concluded that Commission employees would not be available to prepare the Chairman or to provide the briefing themselves because the work did not fall within one of the recognized exemptions to the ADA.<sup>6</sup> Under the ADA, an officer or employee of the federal government may not perform work unless, as relevant here, that work is (1) funded by appropriations,<sup>7</sup> (2) necessary to prevent an “imminent threat[]” to “the safety of human life or the protection of property,”<sup>8</sup> or (3) otherwise “authorized by law.”<sup>9</sup> Because the Commission’s annual salaries and expenses appropriation had lapsed at the time of your request, the Commission had to consider whether either the “imminent threat” exemption or “authorized by law” exemption permitted the work required for the briefing. The Office of General Counsel concluded that neither exemption applied.

In considering the scope of the ADA’s exemptions, the Office of Management and Budget has advised federal agencies to look for guidance in opinions issued by the U.S. Department of Justice’s Office of Legal Counsel (OLC).<sup>10</sup> In an opinion letter issued during the Clinton Administration, OLC considered whether federal officers or employees could assist with a Congressional request for testimony during a shutdown and concluded that federal staff to whom the ADA applies may not prepare Senate-confirmed officers for testimony “unless these [support] activities are independently justified under the [ADA’s] exemptions.”<sup>11</sup>

With respect to the safety of life or property exemption, OLC concluded that the threshold would be met in the context of a Congressional hearing only in the “highly unusual event that suspension of the Department’s participation in a Congressional hearing would imminently threaten the safety of human life or the protection of property.”<sup>12</sup> Applying that test here, the FCC’s career attorneys concluded that your request for a briefing to Committee staff about the status of an investigation that had been ongoing for months did not constitute the

---

<sup>5</sup> Letter from Rep. Frank Pallone, Jr., Chairman House Committee on Energy and Commerce, to Ajit Pai, Chairman, Federal Communications Commission (Jan. 11, 2019).

<sup>6</sup> 31 U.S.C. §§ 1341(a)(1)(A)-(B), 1342.

<sup>7</sup> 31 U.S.C. § 1341(a)(1)(A).

<sup>8</sup> *Id.* § 1342.

<sup>9</sup> *Id.* § 1341(a)(1)(B).

<sup>10</sup> OMB’s guidance to agencies instructs agencies to refer to relevant legal opinions issued by the Office of Legal Counsel, “which set forth the legal requirements imposed by the [ADA] during a lapse in appropriations and the guiding standards agencies should use in making decisions under the [ADA] during a lapse in appropriations.” Office of Management and Budget Memorandum 18-05, Planning for Agency Operations during a Potential Lapse in Appropriations, at 1 (Jan. 19, 2018).

<sup>11</sup> See Department of Justice, Memorandum Opinion for the Attorney General, Participation in Congressional Hearings During an Appropriations Lapse, 19 O.L.C. 301, 302 (Nov. 16, 1995).

<sup>12</sup> *Id.*

“highly unusual” circumstance in which delay would “imminently threaten the safety of human life or the protection of property.” Moreover, the only new information to arise during the shutdown came from an article alleging that the sale of consumer location data was continuing. Those allegations, of course, would themselves require investigation and verification by the Enforcement Bureau. For all of these reasons, the Office of General Counsel did not conclude that briefing Committee staff about the status of its suspended investigation would avoid an imminent threat to human life or property.

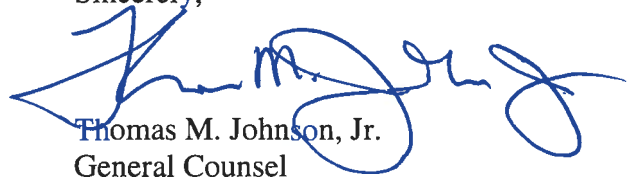
OLC also concluded that there was no general authorization for federal employees to assist in responding to Congressional requests pursuant to the “authorized by law” exemption to the ADA.<sup>13</sup> Importantly, OLC rejected the suggestion that supporting the exercise of legislative power could itself be deemed activity “authorized by law.”<sup>14</sup> “Such a construction,” OLC explained, “is impermissible because it would necessarily nullify the Antideficiency Act. . . . [I]f all constitutionally authorized functions—legislative, executive, and judicial—were excepted, the Act would not apply to any activity of the Federal Government.”<sup>15</sup> The same analysis applied to your request for a briefing of Committee staff during the recent shutdown.

In addition to these considerations, in the view of the Office of General Counsel, it was prudent for the Commission to err on the side of waiting to brief Committee staff until after the shutdown concluded. The Antideficiency Act applies to every officer and employee of the United States and violations carry criminal penalties.<sup>16</sup> It would unnecessarily expose Commission staff to legal risk to have them prepare for a briefing when the available guidance suggested that the Act’s narrow exemptions did not apply. Accordingly, the Office of General Counsel advised the Chairman to provide the briefing after the shutdown concluded.

Once the shutdown ended and the Commission resumed normal operations on January 28, 2019, Commission staff worked diligently to brief Committee staff on the pending investigation, and the requested briefing occurred on Friday, February 7. The Commission looks forward to continuing its important work of protecting consumers—including by investigating potential violations and taking enforcement action where appropriate.

Per your request, I am attaching the principal legal authorities that support the Office of General Counsel’s conclusions. Thank you for your interest in this matter.

Sincerely,



Thomas M. Johnson, Jr.  
General Counsel

---

<sup>13</sup> See Department of Justice, Memorandum Opinion for the Attorney General, Participation in Congressional Hearings During an Appropriations Lapse, 19 O.L.C. at 303-304.

<sup>14</sup> *Id.* at 303.

<sup>15</sup> *Id.* at 304.

<sup>16</sup> 31 U.S.C. § 1350.